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Clerk, U. S. District Court
Western District of Texas
By [signature]
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NOVA CONSULTING GROUP, INC.,	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. SA-03-CA-0305-FB
ENGINEERING CONSULTING SERVICES, LTD.,	§	
Defendant.	§	

COURT'S INSTRUCTIONS TO THE JURY

I. GENERAL INSTRUCTIONS ON THE TRIAL

MEMBERS OF THE JURY:

In any jury trial there are, in effect, two judges. I am one of the judges; you the jury are the other judge, the judges of the facts. You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

You must answer all questions from a preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In other words, a preponderance of the evidence just means the amount of evidence that persuades you that a claim is more likely so than not so. In determining whether any fact has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe all or any part of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the plaintiff or the defendant? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence—such as testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field--he or she is called an expert witness--is permitted to state his or her opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he or she testifies regularly as an expert witness and his or her income from such testimony represents a significant portion of his or her income.

Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.

You are instructed that a corporation is a creation of state law and can act only through its agents—that is, its employees, officers or authorized representatives. In order to find that the act of an agent was binding on the corporation you must find that the agent had authority to act in the manner in which he or she is alleged to have acted.

II. GENERAL DEFINITIONS

Proximate Cause

"Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using the degree of care required of him or her would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Clear and Convincing Evidence

"Clear and convincing evidence" means the measure of degree of proof that produces in your mind a firm belief or conviction of the truth of the allegations sought to be established.

III. CLAIM-SPECIFIC INSTRUCTIONS

Unfair Competition

Nova is seeking damages from ECS for unfair competition. ECS denies Nova's claim.

You are instructed that to find that ECS engaged in unfair competition, you must find that ECS engaged in one or more of the following acts: (1) misappropriation of Nova's trade secrets; (2) tortious interference with Nova's employment agreements by use of confidential and proprietary information or by soliciting Nova employees.

Misappropriation of Trade Secrets

You are instructed that a "trade secret" means any process, compilation of information, formula, pattern, or device that gives a business an opportunity to obtain an advantage over competitors who do not know or use it. In order to be a "trade secret," there must be a substantial element of, though not absolute, secrecy and a party must take reasonable measures to protect the secrecy of its trade secrets. Matters of public knowledge or of general knowledge in an industry cannot be "trade secrets." However, a "trade secret" need not be novel or unique and it may consist of a combination of simple and otherwise known components. The fact that a trade secret can be discovered by experimentation and other lawful means does not deprive its owner of protection from those acquiring it by unfair means. The personal efficiency, inventiveness, skills and experience that an employee develops through work belong to the employee, not the former employer; however, trade secrets developed by the employee in the course and scope of his employment, and trade secrets disclosed to the employee by the employer, are the property of the employer, not the employee.

To prove misappropriation of trade secrets, a plaintiff must establish the existence of a trade secret. The plaintiff must also prove: (a) a defendant discloses the trade secret or uses it after learning the trade secret from a third person with notice of the facts that it was a secret and that the third person's disclosure of it was otherwise a breach of duty to the other; or (b) a defendant acquired the trade secret by improper means and disclosed or used the trade secret without authorization. Misappropriation does not require that defendant use it in exactly the form in which defendant received it; however, it must be substantially derived therefrom. A defendant may be liable even if he uses it with modifications or improvements upon it effected by his own efforts. Liability is avoided when the contribution of the other's secret is slight and the actor's process can be said to have been derived from the other sources.

A defendant has "notice" of facts when a defendant should know them if, from the information which a defendant has, a reasonable person would infer the facts in question, or if, under the circumstances, a reasonable person would be put on inquiry and an inquiry pursued with reasonable intelligence and diligence would disclose the facts. A defendant may have notice of a fact because he has been given a notification of it.

Tortious Interference with Employment Agreements

The elements of tortious interference with a contract are: (1) the existence of a contract subject to interference; (2) conduct by the defendant that was willful and intentional; (3) the defendant's conduct was a proximate cause of Nova's damage; and (4) actual damage or loss to Nova.

You are instructed that interference is willful and intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

A defendant may avoid liability if it establishes the elements of the defense of justification. A party is privileged to interfere with the contractual relations of another if it acted in a good-faith belief that it had a right to do so.

Lost Profits

Nova seeks to recover as damages lost profits from the defendant. A party seeking to recover lost profits must show its loss by competent evidence with reasonable certainty. Reasonable certainty means that opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. A plaintiff is not required to establish lost profits with absolute certainty.

Exemplary Damages

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment. Factors to consider in awarding exemplary damages, if any, are: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the defendant; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant.

Exemplary damages can be assessed against ECS as a principal because of an act by an agent if, but only if: (1) the principal authorized the doing and manner of the act; or (2) the agent was employed in a managerial capacity and was acting in the scope of employment; or (3) the employer or a manager of the employer ratified or approved the act.

V. CONCLUDING INSTRUCTIONS

If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Recovery, if any, will be determined by the Court when it applies the law to your answers at the time of judgment.

When you retire to the jury room to deliberate on your verdict, you may take this charge with you as well as exhibits which the Court has admitted into evidence. Select your Presiding Juror and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that I have given you concerning your conduct during the trial. After you have reached your unanimous verdict, your Presiding Juror must fill in your answers to the written questions and sign and date the verdict form. Return this charge together with your written answers to the questions. Unless I direct you otherwise, do not reveal your answers until such time as you are discharged. You must never disclose to anyone, not even to me, your numerical division during your deliberations on any question.

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

Remember that in a very real way you are the judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case. In this and any lawsuit, the credibility of witnesses is important. You are the sole judges of whether to believe or disbelieve all, part or none of the testimony of any witness.

If you want to communicate with me at any time, please give a written message or question to Officer Miller, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first show the attorneys your question and my response before I answer your question. After you have reached a verdict, you are not required to talk with anyone about the case unless I order you to do so, but you may talk about the case with others after the case is over if you choose to do so.

FRED BIERY
UNITED STATES DISTRICT JUDGE

October 10, 2005
Date